



# American Health Lawyers Association

## State Law Landscape for Health Information Technology

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# Objectives

- Describe the national landscape of state laws regulating health information
- Explore the implications and effects of persistent misconceptions of legal barriers to data use
- Discuss some moral, economic, social and political factors, that may be relevant to your client's situation.

# Advising Clients

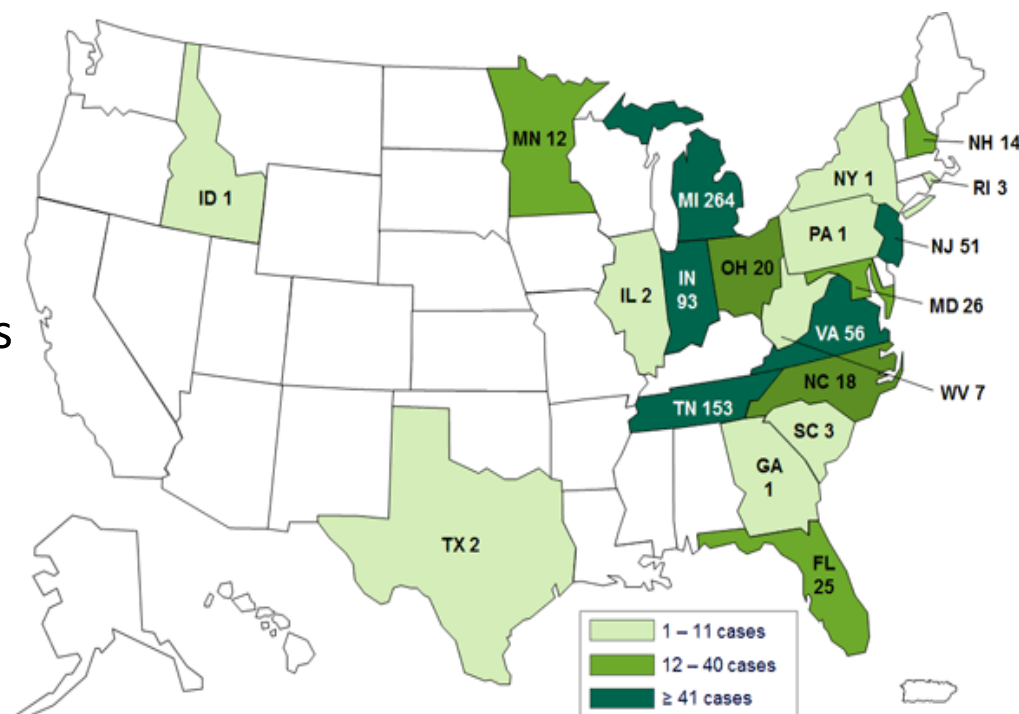
## Model Rules for Professional Conduct

### Rule 2.1 Advisor

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, **a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.**”

# Fungal Meningitis Outbreak 2012

- Healthcare associated infection
  - 753 total cases
  - 64 deaths
  - 20 states
- Outbreak revealed critical issues relating to releasing of health information





ASSOCIATION OF STATE AND TERRITORIAL HEALTH OFFICIALS

PROGRAMS +

EVENTS +

GOVERNMENT AFFAIRS +

RESEARCH +

MEMBERS +

## HEALTHCARE-ASSOCIATED INFECTIONS

### Improving Your Access to Electronic Health Records During Outbreaks of Healthcare-associated Infections

#### A TOOLKIT FOR HEALTH DEPARTMENTS

The purpose of this toolkit is to help professionals working in local, state, and territorial health departments have better access to the electronic health record (EHR) systems in healthcare facilities (e.g. hospitals, outpatient clinics, surgical centers, etc.) during outbreaks, including outbreaks of healthcare-associated infections (HAIs).

Public health and healthcare share a common goal of preventing, detecting, and controlling diseases, but they have different critical roles. Public health agencies have the responsibility to communicate with relevant authorities and stakeholders, including healthcare facilities, to ensure an appropriate and rapid response during outbreak situations with complete transparency. Interactions between public health officials and healthcare facilities are essential for protecting and improving the health of patients during any outbreak, including an HAI outbreak.

# Identifying “Real” and “Perceived” Legal Barriers

“Public health officials consistently reported perceived HIPAA barriers as a reason healthcare facilities were hesitant to provide health departments with access to patient information.”



<http://www.astho.org/Toolkit/Improving-Access-to-EHRs-During-Outbreaks/>

# HIPAA Public Health Exception

“(1) Permitted uses and disclosures. **A covered entity may use or disclose protected health information for the public health activities and purposes described in this paragraph to:**

(i) A public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and **the conduct** of public health surveillance, **public health investigations, and public health interventions**; or, at the direction of a public health authority, to an official of a foreign government agency that is acting in collaboration with a public health authority;...”

45 C.F.R. § 164.512 (b)



# Identifying “Real” and “Perceived” Legal Barriers

“Making sure that [facilities and providers] have an understanding of their state privacy laws and obviously the federal side of it. That is the biggest issue that we run into.”

- Health department staff



<http://www.astho.org/Toolkit/Improving-Access-to-EHRs-During-Outbreaks/>

# Reviews of State Laws Protecting Health Information

“a morass of erratic law”

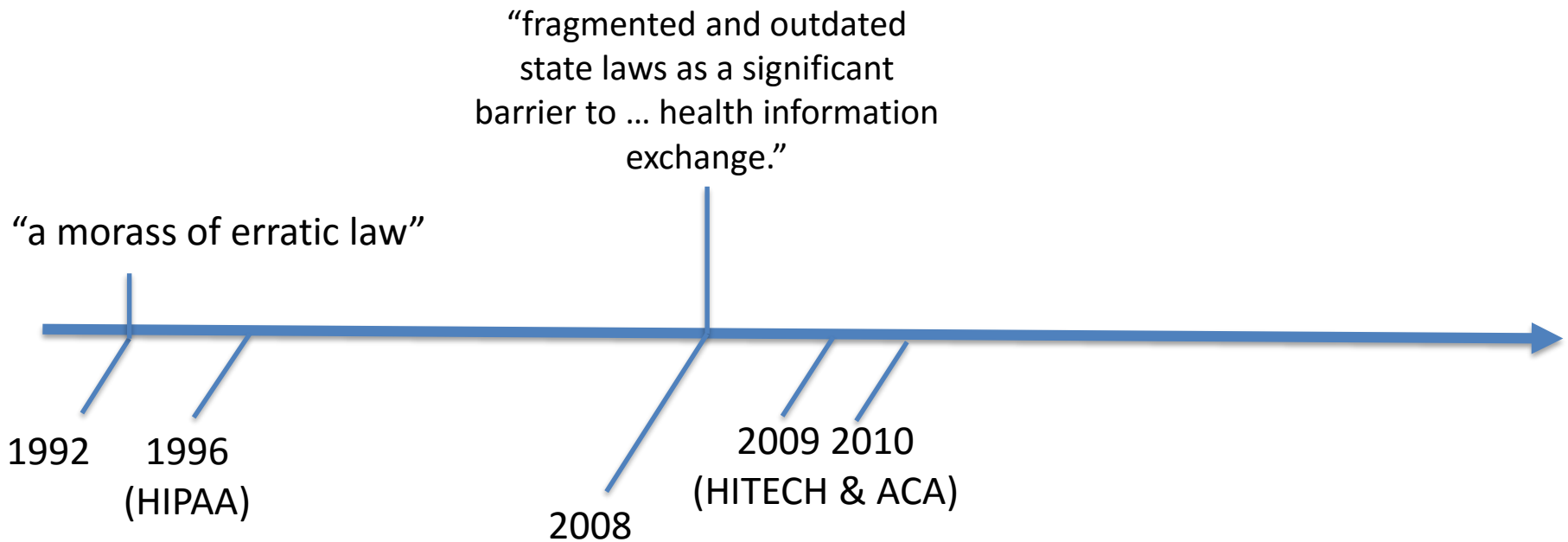


Workgroup for Electronic Data Interchange, “Report to Secretary of U.S. Department of Health and Human Services, Appendix 4” (1992), (available at <https://www.wedi.org/docs/public-policy/wedi-report-1992.pdf>).

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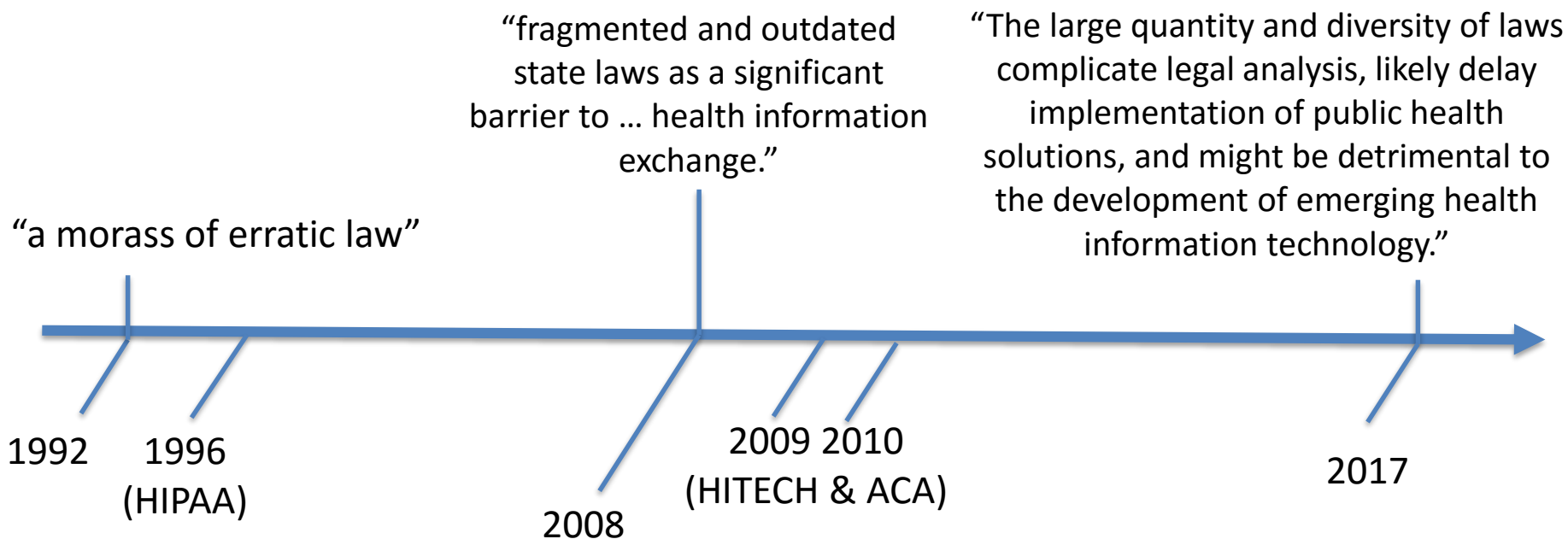


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# Evaluating State Laws Regulating Electronic Health Information

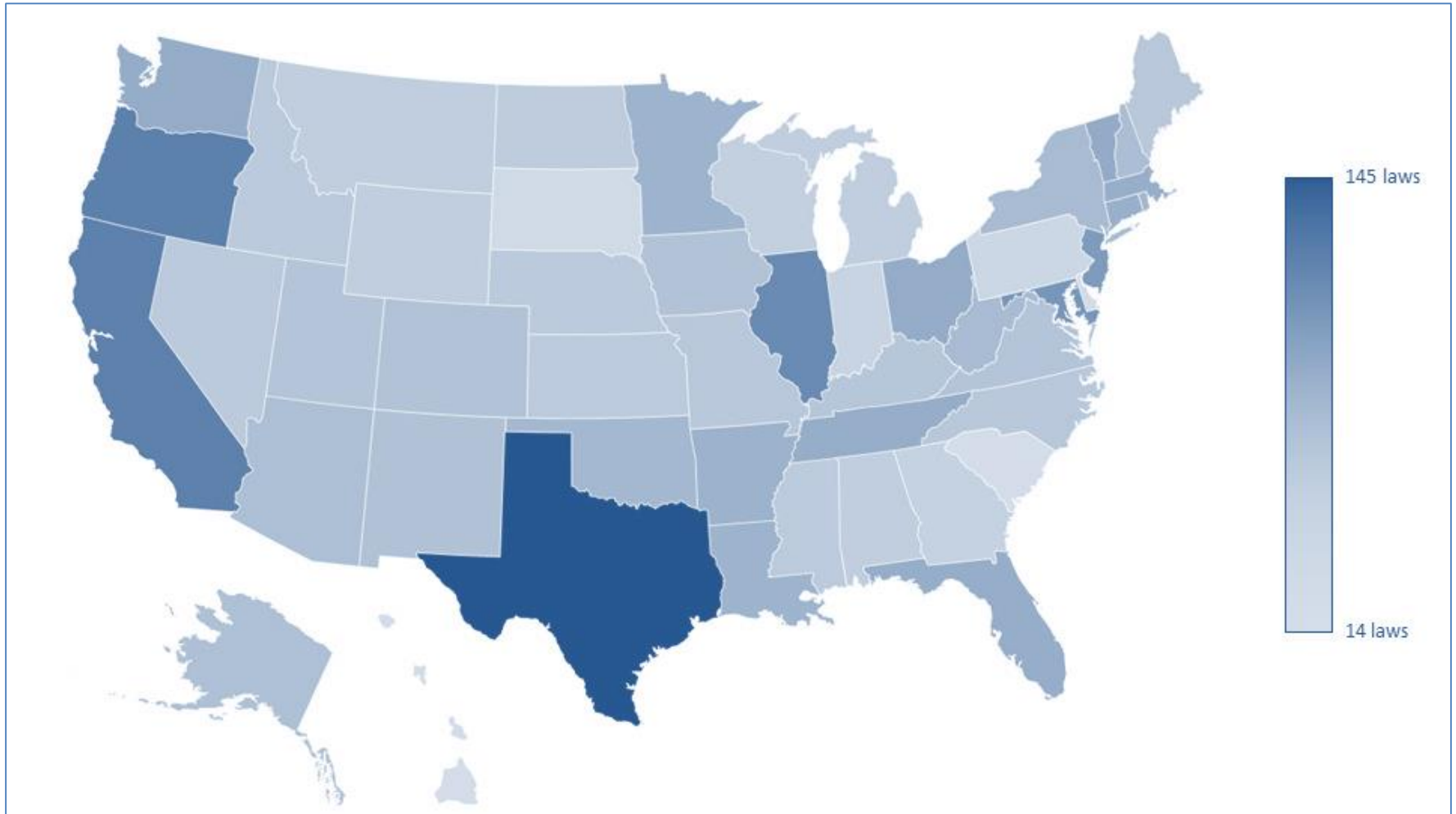
- What we did
  - Identified relevant legal provisions using Westlaw legal database
    - Only includes laws in effect as of January 2014
  - Categorized legal provisions by the nature of electronic health information use described in the law
- What we found
  - States have passed numerous laws addressing electronic health information:
    - 2,364 statutes and regulations
    - 49 different regulated uses
  - State legal frameworks are diverse and vary qualitatively and quantitatively

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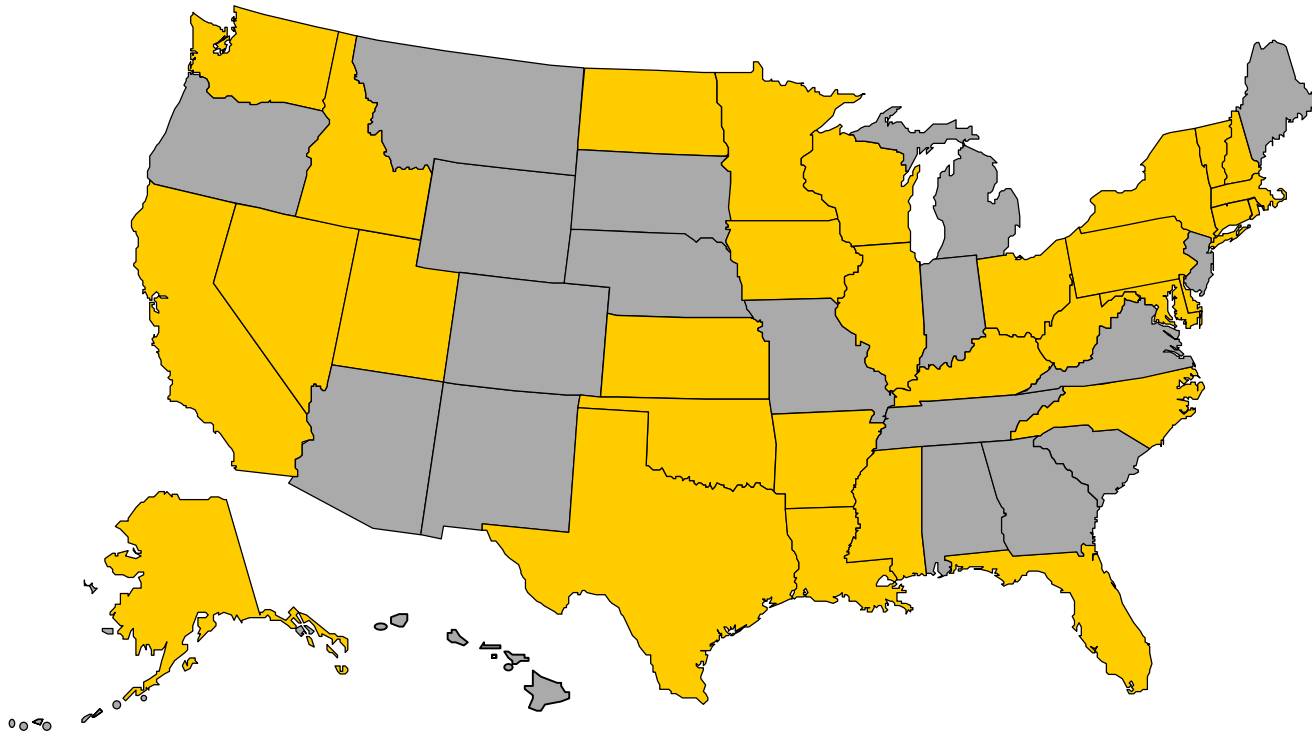
# Uses of Electronic Health Information Regulated by Laws in effect January 2014



# Number of laws relating to Electronic Health Information in effect January 2014 (all states).



# State Health Information Exchange (HIE) Laws

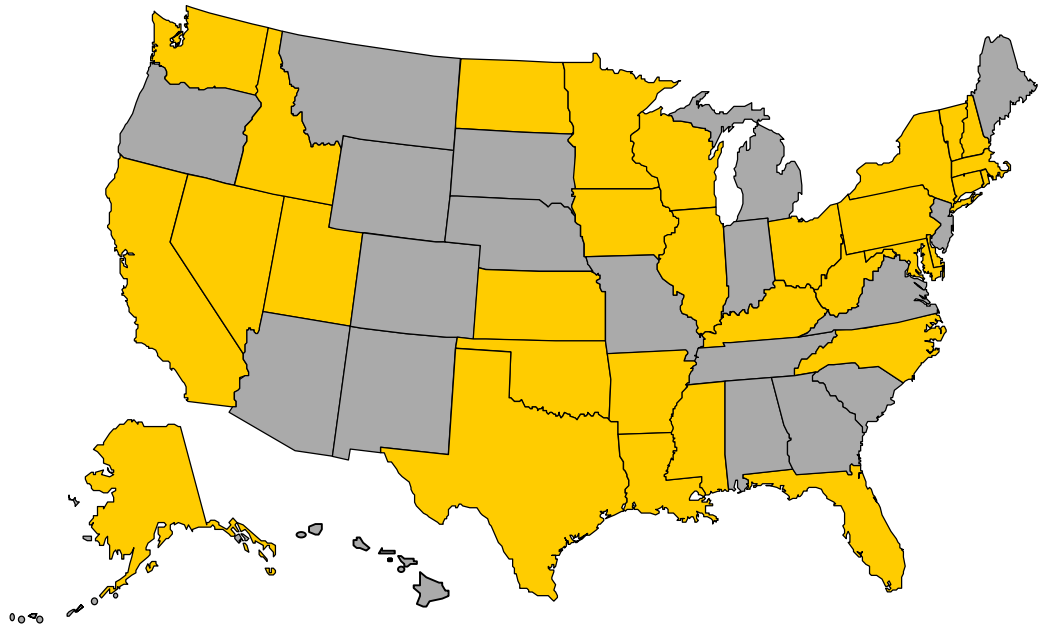




# HIE Oversight Entity (2016)

- State entity with oversight responsibilities for the HIE

■ Yes (31)



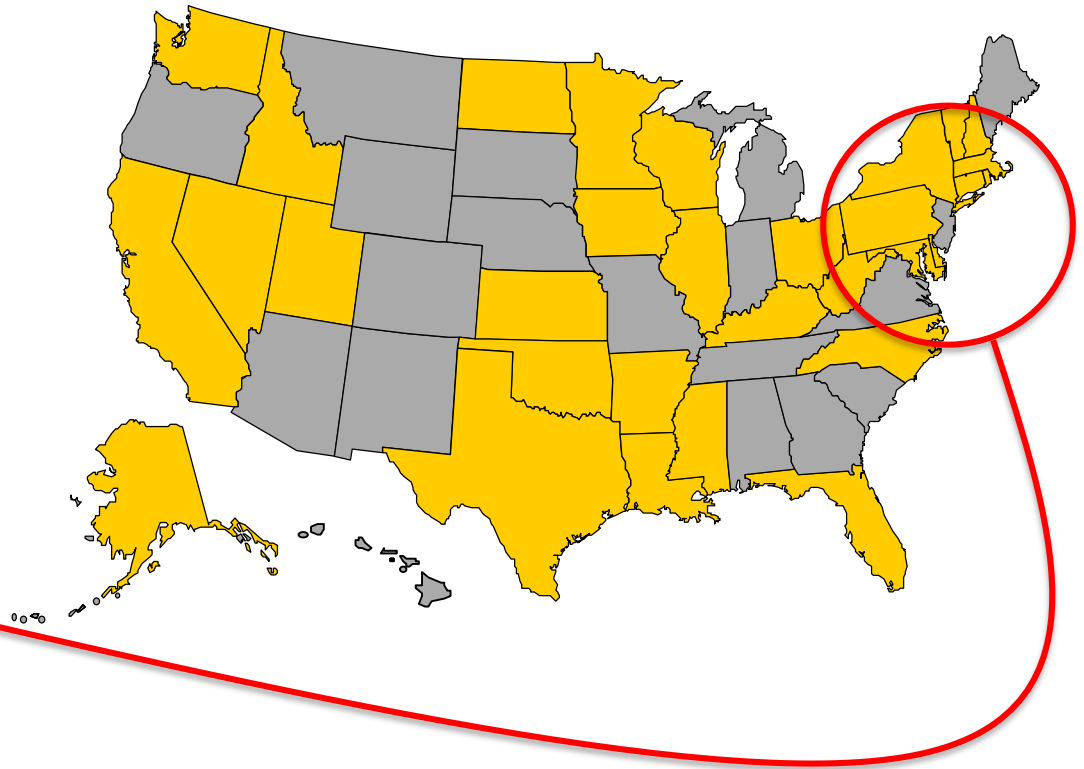
Preliminary data from a study of Health Information Exchange Laws

# HIE Oversight Entity (2016)

- State entity with oversight responsibilities for the HIE

■ Yes (31)

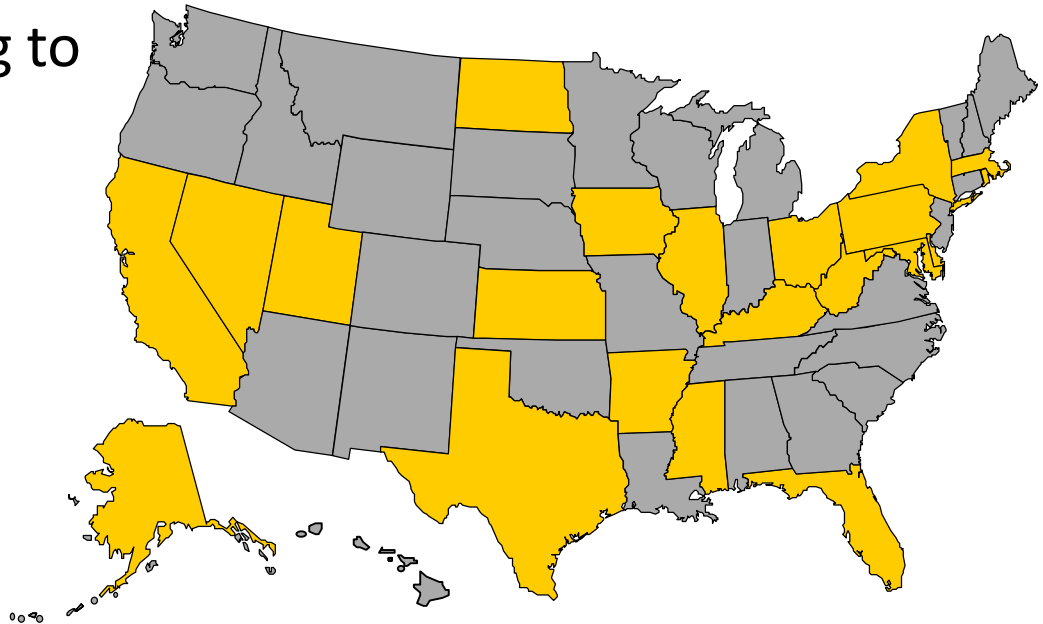
At least 11 oversight entities within 300 miles of New Jersey



# State Entity HIE Rule-Making (HIE)

- State entity authorized to promulgate rules and regulations pertaining to the HIE

Yes (23)

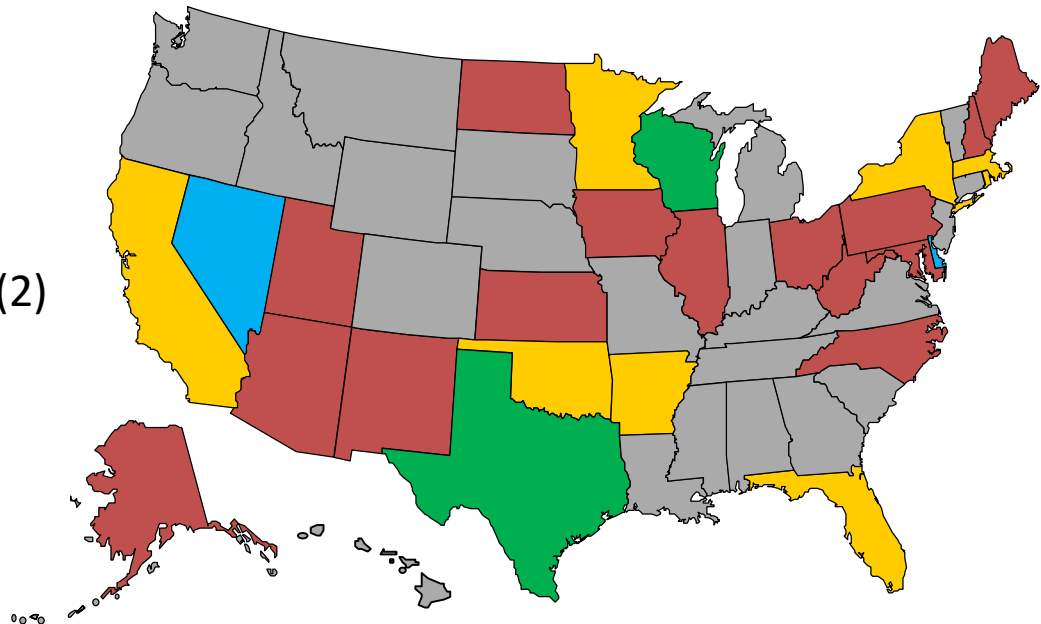


Preliminary data from a study of Health Information Exchange Laws

# HIE Consent Model (2016)

- State entity with oversight responsibilities for the HIE

- Opt-in (8\*)
- Opt-out (15)
- Voluntary/not specified (2)
- Ambiguous (2\*\*)



Preliminary data from a study of Health Information Exchange Laws

\* - Includes California Demonstration HIE legislation

\*\* - Coded "Ambiguous" if law could either satisfy the coding criteria or not, depending on differing reasonable interpretations of the terms of the law.

# Actual and Perceived Legal Barriers to Data Use and Release

- There are many perceived legal barriers to data use and release
  - Not all are actual legal prohibitions
- Three approaches to perceived barriers
  - Apply conservative data use policies
  - Identify legal solutions
  - Identify technological solutions

**Clients need an understanding of underlying legal framework**

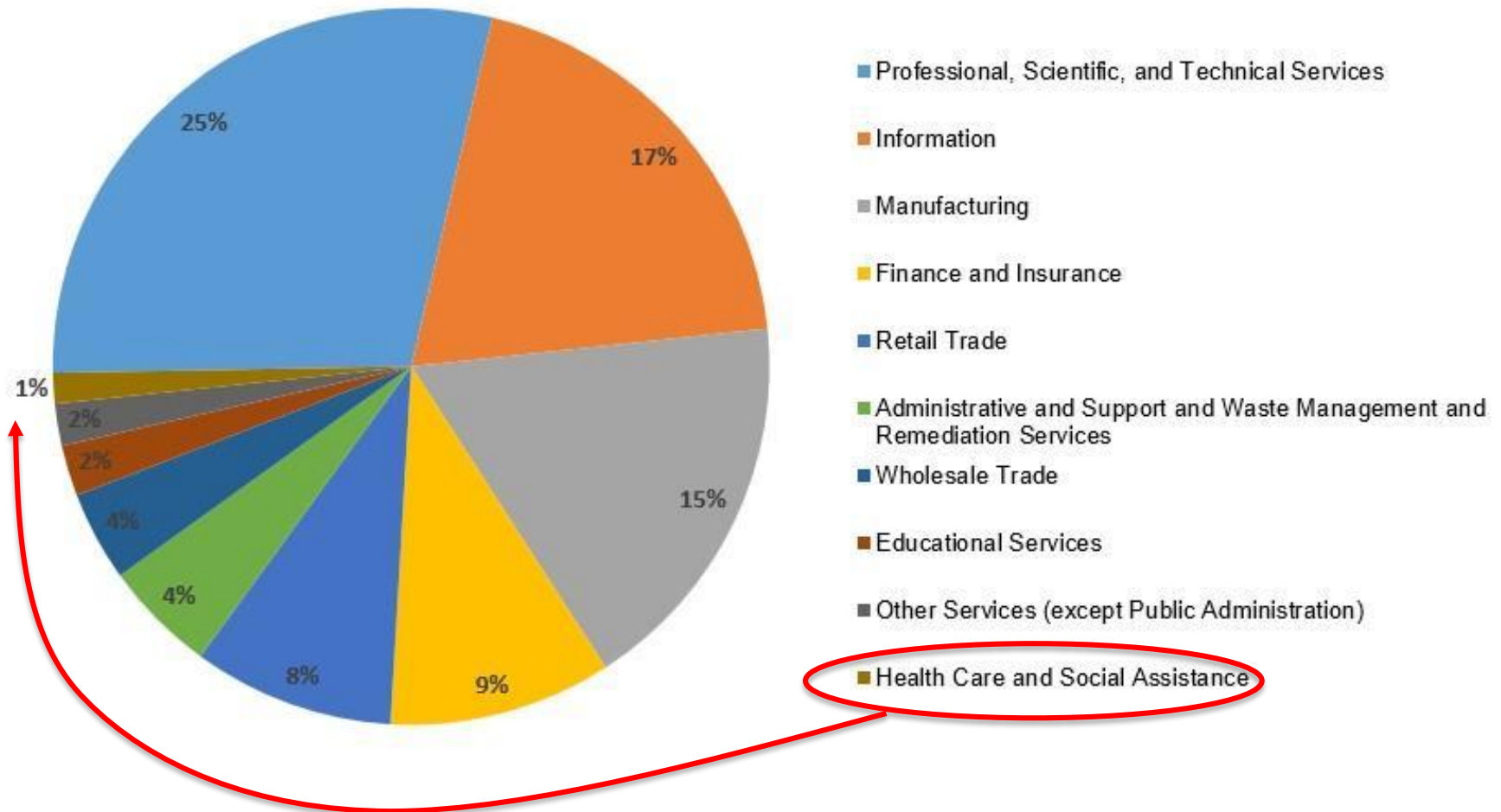


# Future Applications of HIT

- **Future HIT applications require data portability!!!**
  - Mobile medicine
  - Precision medicine
  - Learning health systems
- Health care will rely heavily on “big data” in the future

# Top 10 Industries Hiring Big Data Expertise

Source: Wanted Analytics, 2015



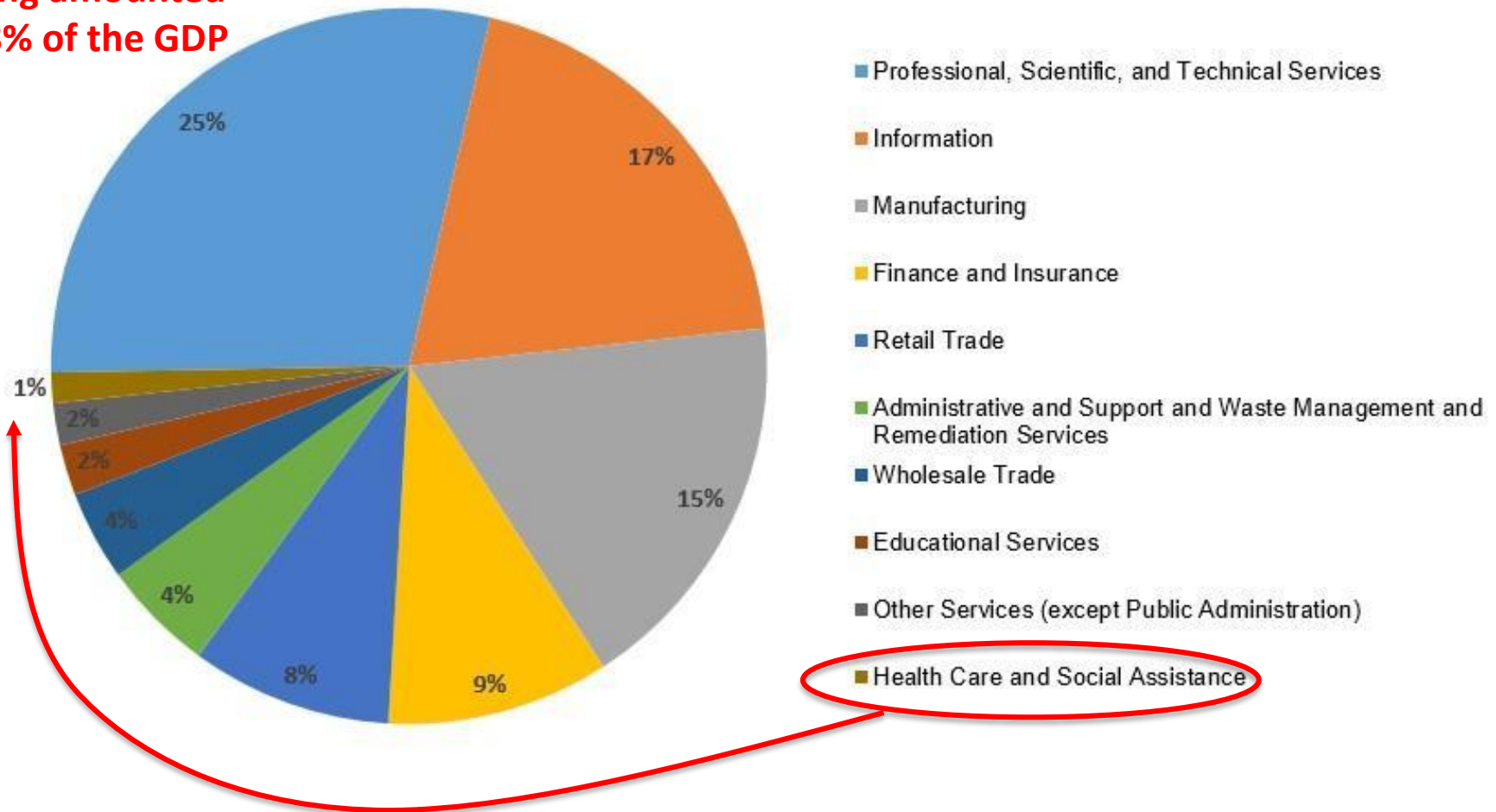
<https://www.forbes.com/sites/louiscolumbus/2015/06/25/where-big-data-jobs-are-in-2015-midyear-update/#155560022050>

A. B. Martin, M. Hartman, B. Washington, A. Catlin, the N. H. E. A. National Health Expenditure Accounts Team, National Health Spending: Faster Growth In 2015 As Coverage Expands And Utilization Increases. *Health Aff. (Millwood)*. **36**, 166–176 (2017).

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Source: Wanted Analytics, 2015

In 2015, healthcare spending amounted to 17.8% of the GDP



<https://www.forbes.com/sites/louiscolumbus/2015/06/25/where-big-data-jobs-are-in-2015-midyear-update/#155560022050>

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